TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 219.

HENRY O. HARKNESS, PLAINTIFF IN ERROR,

vs.

JORDAN W. HYDE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED OCTOBER 11, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 219.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Bond	5	2
Complaint	6	3
Summons	11	4
Motion to dismiss	14	6
Affidavit of Harkness	16	6
Order remanding cause	20	8
Answer	22	8
Record entry	24	9
Judgment	33	12
Motion for new trial	38	14
Order granting leave to modify judgment	39	14
Release of part of judgment	41	15
Judgment modified	43	15
Notice of appeal	44	16
Undertaking on appeal	48	17
Undertaking on appeal	50	18
Bill of exceptions	53	19
Evidence of J. W. Hyde	59	21
Richard Thomas	65	22
H. O. Harkness	70	24
Henry Riley	78	27
L. A. Harkness	74	26
C. Harkness	77	26
Exhibit A	88	30
Evidence of H. O. Harkness	91	31
H. O. Harkness	92	31
B. F. White	92	31
Judgment supreme court	97	33
Assignment of errors	94	32
Clerk's certificate	99	34
Assignment of errors	100	34

1 Supreme Court United States.

HENRY O. HARKNESS, PLAINTIFF IN ERROR,
vs.
JORDAN W. HYDE, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the supreme court of Idaho Territory, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Jordan W. Hyde and Henry O. Harkness, a manifest error hath happened, to the great damage of the said Henry O. Harkness, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment be therein given that under your seal, distinctly and openly, you send the record
2 and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 9th day of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the 21st day of March, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] A. L. RICHARDSON,
Clerk of the Supreme Court of the Territory of Idaho.

Allowed this 21st day of March, A. D. 1876.

M. E. HOLLISTER,
Ch. Justice Sup. C't of Idaho T'y.

(Indorsed:) Supreme Court United States. H. O. Harkness, pl'ff in error, vs. J. W. Hyde, def't in error. Writ of error. Filed M'ch 22d, 1876. A. L. Richardson, clerk.

3 Supreme Court United States.

HENRY O. HARKNESS, PLAINTIFF IN ERROR,
vs.
JORDAN W. HYDE, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *ss:*

To Jordan W. Hyde, greeting:

You are here cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of Oct. next, wherein Henry O. Harkness is plaintiff and you are defendant in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-six.

M. E. HOLLISTER,
Chief Justice of the Supreme Court of Idaho Territory.

4 I admit personal service of the within citation this 22d day of March, 1876.

JO. W. HUSTON,
One of the Attorneys for Def't in Error.

On this 22nd day of March, A. D. 1876, personally appeared John S. Gray, deputy U. S. marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph W. Huston, one of the attorneys for defendant in error, this 22ndday of March, A. D. 1876.

J. S. GRAY.

Subscribed and sworn to before me this 22nd day of March, A. D. 1876.

[SEAL.] A. L. RICHARDSON,
Clerk Sup. Court I. T.

(Indorsed:) Supreme Court United States. H. O. Harkness, pl'ff in error, vs. J. W. Hyde, def't in error. Citation. Filed March 22nd, 1876. A. L. Richardson, clerk sup. court, I. T.

5 Supreme Court of the United States.

HENRY O. HARKNESS, PLAINTIFF IN ERROR,
vs.
JORDAN W. HYDE, DEFENDANT IN ERROR.

Know all men by these presents that we, Henry O. Harkness, plaintiff in error, and William McCrea and Meyers Cohn, of Oneida County, Idaho Territory, are held and firmly bound unto Jordan W. Hyde of Madison County, Territory of Montana, in the sum of four thousand ($4,000) dollars, to be paid to the said Jordan W. Hyde, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seal—dated the 21st day of March, A. D. 1876.

Whereas the above-named Henry O. Harkness hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Idaho.

Now, therefore, the condition of this obligation is such that if
5½ the above-named Henry O. Harkness shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make his plea good, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) HENRY O. HARKNESS. [SEAL.]
W'M McCREA. [SEAL.]
MEYERS COHN. [SEAL.]

Sealed and delivered in presence of—
W'M P. APPLELY.
SAMUEL E. MAY.

Approved this 21st day of March, A. D. 1876.

(Signed) M. E. HOLLISTER,
Chief Justice of the Sup. Court of Idaho Territory.

TERRITORY OF IDAHO,
County of Ada, ss:

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, do hereby certify the above and foregoing to be a full, true, and correct copy of the bond on writ of error to the Supreme Court of the United State in the above-entitled cause now on file in my office.

Witness my hand and the seal of said supreme court of I. T., affixed this 15th day of September, A. D. 1876.

[SEAL.] A. L. RICHARDSON,
Clerk.

(Indorsed:) Supreme Court of the United States. Henry O. Harkness, pl'ff in error, vs. Jordan W. Hyde, def't in error. Bond on writ of error. Filed March 22d, 1876. A. L. Richardson, clerk. Certified copy.

6 TRANSCRIPT.

Supreme court, Idaho Territory, Jan'y term, 1874.

JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS, DEF'T.

This cause was commenced in the third district court in and for Oneida County by complaint, of which the following is a copy:

Complaint.

TERRITORY OF IDAHO,
County of Oneida:

In the district court of the 3d judicial district in and for Oneida Co.

JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS, DEF'T.

The above-named plaintiff complains of the above-named defendant, and alleges—

That on the 7th day of July, A. D. 1873, at Oneida County, Idaho Territory, the defendant maliciously and without probable cause
7 therefor procured to be issued by one Richard Evons, esqr., a justice of the peace of Malad precinct in said Oneida County, a writ of attachment against the property of this plaintiff for the sum of eighty-three and $\frac{50}{100}$ dollars.

That under and by virtue of said writ of attachment, so, as aforesaid, issued, this defendant did procure and cause to be seized, taken, and detained from the possession of this plaintiff a large amount of personal property, goods, and chattels, to wit, twenty-five head of cattle, viz, twenty-three steers and two cows, of the value of one thousand dollars, and did hold and detain the same from the possession and control of this plaintiff for a long time, to wit, for the period of ten days.

That afterwards, to wit, on the 17th day of July, 1873, at Oneida County aforesaid, the said writ of attachment was, upon the motion of this plaintiff (therein defendant), by said justice of the peace dismissed,

and the said property of this plaintiff (defendant in said attachment), so as aforesaid seized and taken thereunder, was released to this plaintiff.

That afterwards, to wit, on the 17th day of July, 1873, at Oneida County aforesaid, this defendant (then plaintiff) did again maliciously and without probable cause therefor procure another writ of attachment to be issued by the said justice of the peace against the property of this plaintiff for the sum of eighty-three & $\frac{50}{100}$ dollars. Under and by virtue of said last-mentioned writ of attachment the said defendant did cause and procure to be seized and detained a large amount of the personal property, goods, and chattels of this plaintiff, to wit, twenty-five head of cattle, viz, twenty-three steers and two cows, of great value, to wit, of the value of one thousand dollars.

That said levies and seizures of the said property of this plaintiff, under and by virtue of said writ of attachment, was made by the direction and in the presence of this defendant; that the same was malicious, wrongful, unlawful, and grossly excessive, and tended to the manifest injury and oppression of this plaintiff.

That afterwards, to wit, on the 22d day of July, 1873, upon a trial of the issues joined between the said plaintiff and defendant in the action in aid of which the said writs of attachment was so, as aforesaid, issued before said justice of the peace, with a jury, a verdict was rendered by such jury in favor of this plaintiff and against this defendant, and judgment entered in said justice court in accordance therewith.

Therefore, and by reason of the said wrongful, unlawful, and malicious acts of the said defendant as aforesaid, this plaintiff has been greatly damaged and injured in money paid, laid out, and expended by him in defending the said suits instituted against him by this defendant, and in procuring the release of his said cattle, in the sum of five hundred dollars, in damages sustained by him in the depreciation in the value of said cattle and other cattle then and there being by him transported to market, and the transportations of which was delayed by the said wrongful, unlawful, and malicious acts of the said defendant, in the sum of one thousand dollars.

For expenses incurred by the plaintiff in consequence and by reason of the hindrance and delay in his business by reason of said unlawful, wrongful, and malicious acts of this defendant, in the sum of one thousand dollars.

And for other injuries by the said plaintiff sustained, by reason of the said wrongful and malicious acts of defendant, in the sum of two thousand dollars.

Wherefore this plaintiff demands judgment against this defendant for the sum of four thousand and five hundred dollars and costs of this action.

HUSTON & GRAY AND
F. E. ENSIGN,
Plaintiff's Att'ys.

(Endorsed as follows:) District court, 3d jud'l district, Oneida County, I. T. Jordan W. Hyde, pl'ff, vs. H. O. Harkness, def't. Complaint. Filed September 11th, 1873. E. A. Hollister, clerk. Huston and Gray and F. E. Ensign for pl'ff.

Whereupon, summons was issued, of which the following is a copy:

Summons.

TERRITORY OF IDAHO,
County of Oneida, ss:

In the district court for the Territory of Idaho, 3d judicial district.

JORDAN W. HYDE, PLAINTIFF,
vs.
H. O. HARKNESS, DEFENDANT.

To H. O. Harkness, said defendant:

In the name of the people of the United States in the Territory of Idaho.

You are hereby notified that there is now on file in the office of the clerk of the district court of the 3d judicial district of said Territory, in said county of Oneida, the complaint of Jordan W. Hyde, demanding judgment against you in the sum of four thousand five hundred dollars and costs of suit.

This action is founded on the following state of facts, to wit, that you did, on the following dates, to wit, July 7th and July 17th, 1873, at Oneida Co., I. T., procure two writs of attachment to be issued by Richard Evans, esqr., a justice of the peace in Malad precinct in said county, under and by virtue of which said attachments and on the dates
12 aforesaid, you caused to be seized and detained twenty-five head of cattle of the value of $1,000\frac{00}{100}$, being the property of said plaintiff, all of which was done maliciously and without probable cause, and all of which is more fully set out in a certified copy of said complaint served herewith.

Wherefore he demands judgment as above stated, and that, unless you appear and answer to said complaint within ten days after the service hereof if served within said county, and within twenty days if served out of said county, but within said judicial district, and within thirty days if served out of said district, exclusive of the day of service, judgment will be taken against you by default for said sum of four thousand five hundred dollars and costs of suit.

In testimony whereof I, E. A. Hollister, clerk of said district court, have hereunto set my hand and affixed the seal of said court at Malad City, I. T., this 24th day of September, A. D. 1873.

[L. S.] E. A. HOLLISTER,
Clerk of the District Court.

13 (Indorsed on said summons was the following return:)

TERRITORY OF IDAHO,
County of Oneida:

I hereby certify that I did, on the 27th day of September, A. D. 1873, at the county of Oneida and Territory of Idaho, serve the within summons by delivering a true copy thereof, together with a certified copy of the complaint in said cause, to the within-named defendant, H. O. Harkness.

My fees, $20.25.

M. MORGAN,
Sheriff.

District court, 3d judicial district, county of Oneida. Jordan W. Hyde,

plaintiff, against H. O. Harkness, defendant. Summons. Filed on return, Sept. 27th, 1873. E. A. Hollister, clerk. Huston & Gray and F. E. Ensign, attorneys for plaintiff.

14 The defendant appeared specially by attorney and filed his motion to dismiss said action, of which the following is a copy:

Motion to dismiss.

TERRITORY OF IDAHO,
County of Oneida:

In the district court of the 3d judicial district in and for Oneida County.

JORDAN W. HYDE
vs.
H. O. HARKNESS.

The said defendant, by L. P. Higbee and Johnson and Hyndman, his attorneys, specially appointed for the purpose of this motion and for none other, makes this his special appearance in the above-entitled action, and thereupon moves the court to dismiss the suit herein for that the service in said cause was not made by any officer, or in the place required by law, in this: That the said writ and copy of complaint was served on this defendant by one Morgan Morgan, sheriff of Oneida County, outside of and beyond the limits of his bailiwick, viz, at the residence of this defendant located and situate on the United
15 States reservation known as the "Bannock" or "F't Hall" reservation, within the exclusive jurisdiction of the United States Government, and without the boundaries and jurisdiction of said Oneida County.

L. P. HIGBEE AND JOHNSON & HYNDMAN,
Special Att'ys for Def't for the purposes of this motion only.

(Endorsed as follows:) In the district court, 3d judicial dis't for Oneida County, I. T. Hyde vs. Harkness. Motion to dismiss. Filed October 29th, 1873. E. A. Hollister, clerk.

16 In support of said motion said def't filed his affidavit, in the words and figures following, viz:

Affidavit of H. O. Harkness.

TERRITORY OF IDAHO,
County of Oneida:

In the district court of the third judicial district in and for Oneida Co.

JORDAN W. HYDE
vs.
H. O. HARKNESS.

ONEIDA COUNTY, *ss:*

Henry O. Harkness, the defendant in the above-entitled action, being first duly sworn, deposes and says that he resides now and for more than one year last past has continuously resided at the Port Neuf Cañon toll-gate, in said Territory; that his dwelling-house and said

place of residence are situate on and within the boundaries of the Indian reservation known as and called the Fort Hall, or Shoshone reservation, a place, as affiant is informed and believes, within the sole and exclusive jurisdiction of the United States of America; that on the 27th day of September, 1873, the writ and copy of complaint
17 in this action was served on this affiant at his said dwelling-house on said reservation, and not elsewhere, and at a point within and more than five miles distant from either boundary of said reservation; that said service was so made by one Morgan Morgan, of Oneida Co.

H. O. HARKNESS.

Subscribed & sworn to before me this 6th day of Oct., 1873.
E. A. HOLLISTER, *Clerk.*

Subscribed and sworn to as amended this 6th day of November, 1873.
E. A. HOLLISTER, *Clerk.*

(Endorsed as follows:) In district court, 3d dist. Idaho, co. of Oneida. J. W. Hyde vs. H. O. Harkness. Affidavit of H. O. Harkness. Filed October 6th, 1873. E. A. Hollister, clerk.

Affidavit as amended refiled November 6th, 1873.
E. A. HOLLISTER, *Clerk.*

18 Whereupon, by consent of parties and pursuant to statute in such case made and provided, this cause was adjourned into said supreme court, for decision upon said motion by order of said district court, as follows, viz:

Order of adjournment.

TERRITORY OF IDAHO,
County of Oneida:

In district court, 3d judicial district.

JORDAN W. HYDE
vs.
H. O. HARKNESS.

This cause came on regularly for hearing on this 5th day of November, being still of the October term, 1873, upon the motion of defendant to dismiss this action for want of legal service of summons, Jo. W. Huston and F. E. Ensign, esq'r's, appearing as attorneys for plaintiff, and E. P. Johnson and L. P. Higbee, esq'r's, appearing specially for defendant, only for the purpose of said motion; and the said parties, plaintiff and defendant, by their said attorneys, having agreed and stipu-
19 lated for the purposes of said motion in open court that the service of the summons herein was made at the place, in the manner, and by the person set forth in the affidavit of H. O. Harkness filed herein, and it appearing to the court that the decision upon said motion must turn upon important and doubtful principles of law, it is now here by the court ordered, by and with the consent of the parties aforesaid, by their attorneys aforesaid, in open court signified and given, that this cause be, and is hereby, adjourned into the supreme court of said Territory for the decision of said motion according to the law and justice of the case.

M. E. HOLLISTER,
Judge, &c.

(Endorsed as follows:) 3d judicial dist. court in and for Oneida County, Idaho Territory. Jordan W. Hyde vs. H. O. Harkness. Order of adournment. Filed November 5th, 1873. E. A. Hollister, clerk.

20 All of which aforesaid proceedings, matters, and things appear by duly certified transcript from said district court on file and of record in said supreme court.

Said motion came on for hearing in said supreme court and was argued by counsel for the parties respectively and submitted at said January term, 1874, to wit, on the 14th day of January, 1874. And afterwards, at the same term, and on the 16th day of January, 1874, the court made its decision and order thereon, as follows:

Order remanding cause.

It is now considered, ordered, and adjudged by the court here that this cause be, and the same is hereby, remanded with directions to the district court of the third judicial district, in and for the county of Oneida, to overrule the motion of defendant to dismiss the action herein.

To which said decision and order of said supreme court the said defendant, by his counsel, then and there duly excepted, for that
21 the same is error and contrary to law; which exception is hereby allowed.

M. E. HOLLISTER,
Chief Justice of Supreme Court, Idaho Territory.

(Endorsed:) Filed March 22d, 1876. A. L. Richardson, clerk.

22 Supreme court, Idaho Territory. January term, 1876.

JORDAN W. HYDE, RESPONDENT,
vs.
H. O. HARKNESS, APPELLANT.

This cause was remanded to the district court and order made therein in pursuance of the order of said supreme court made January 16th, 1874, and thereupon the defendant (appellant) filed his answer as follows, viz:

Answer.

In the district court of the third judicial district of the Territory of Idaho, in and for the county of Oneida.

JORDAN W. HYDE
vs.
H. O. HARKNESS. } Answer.

The said defendant, for answer to plaintiff's said complaint herein, denies each and every allegation thereof.

Wherefore defendant demands judgment for costs in this action.

L. P. HIGBEE
AND E. P. JOHNSON,
Def't's Att'ys.

23 (Endorsed as follows:) Dist. court. J. W. Hyde vs. H. O. Harkness. Answer. Filed July 16th, 1874. E. A. Hollister, clerk.

24 At the July term, 1875, of said district court, to wit, July 19, 1875, said cause came on for trial in that court, and the following is a copy of the record entries of said trial, to wit:

Record entries.

MONDAY, *July* 19, *A. D.* 1874.

Seventh judicial day of the United States & Territorial district courts.

Court met pursuant to adjournment.—Present, Hon. M. E. Hollister, judge—when the following (among other) proceedings were had, to wit:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

Now this day this cause came on for trial before the court and jury. The clerk proceeded to draw from the jury box the names of twelve persons to serve as a jury in said cause, and the following are the names of the persons so drawn, to wit: William Bradbury, Richard Jones, David Bowen, Mathew Hill, Morgan Jones, Thomas Stephens, John D. Jones, Jenkins Jones, Henry Peck, John Lusk, Edward Woozley, &
25 Nephi Campbell. And it appearing that the said Edward Woozley was not a citizen, he was thereupon excused for the term.

The clerk then proceeded to draw one other name from the jury box, and Nephi Campbell was so drawn. The plaintiff here challenged Henry Peck for cause, which challenge was sustained by the court. The clerk thereupon drew one other name from the jury box to complete the panel, and T. W. Richards was so drawn.

The defendant here challenged Morgan Jones for cause, which challenge was sustained by the court. The clerk thereupon drew one other name from the jury box to complete the panel, and Jesse R. Dredge was so drawn. The defendant here challenged Richard Jones for cause, which said challenge was sustained by the court. The clerk thereupon drew one other name from the jury box to complete the panel, and Rees E. Thomas was so drawn.

The defendant here interposed his challenge for cause to John D. Jones on the ground that it did not appear that he was a resident of the Territory of Idaho, which challenge was overruled by the court
26 To which ruling of the court, defendant, by his counsel, then and there excepted. The plaintiff here challenged William Bradbury peremptorily, and the clerk proceeded to draw the name of one other person from the jury box to complete the panel, and D. L. Thomas was so drawn.

Nephi Campbell was here challenged peremptorily by said defendant. The clerk thereupon drew the name of one other person from the jury box to complete the panel, and David R. Jones was so drawn. Said defendant here challenged David R. Jones peremptorily. The clerk then drew the name of one other person from the jury box to complete the panel; William Griffith was so drawn. Said defendant here challenged Jenkins Jones peremptorily. The clerk then drew the name of one other person from the jury box to complete the panel, and Peter Waddel was so drawn.

The defendant here interposed his challenge to T. W. Richards, which

challenge the court sustained. The clerk then drew from the jury box the name of one other person to complete the panel, and William Evans was so drawn.

27 The defendant here challenged T. W. Richards for cause, which challenge was sustained by the court. The clerk then proceeded to drawn the name of one other person from the jury box to complete the panel, and David Stephens was so drawn.

And the panel being complete, and no further challenges being interposed by either plaintiff or defendant, the following are the jury duly sworn to try the cause, and a true verdict render according to the evidence, to wit: Henry Stephens, D. L. Thomas, William Griffith, David Bowen, Mathew Hill, John D. Jones, David Stephens, John Lusk, Rees E. Thomas, Jesse R. Dredge, William Evans, & Peter Waddle. F. E. Ensign, of counsel for said plaintiff, then stated the case on his part to the jury, followed by L. P. Higbee, esq'r, who stated the case on his part to the jury for the defendant.

The plaintiff thereupon called as witnesses, William H. Waylett, Jordan W. Hyde, and Richard Thomas.

And the hour for adjournment having arrived, ordered: That this court do now adjourn until to-morrow morning, Tuesday, July 20th, A. D. 1875, at nine o'clock a. m.

28 TUESDAY, *July 20th, A. D.* 1875.

Eighth judicial day of the United States and Territorial district courts.

Court met pursuant to adjournment, when the following (among other) proceedings were had, to wit:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

Again this day this cause came on for trial, the jury being called and found to be present.

The plaintiff called as witnesses B. F. White and F. E. Ensign, who were sworn, examined, and cross-examined in that behalf. The plaintiff then recalled Richard Thomas and William H. Waylett as witnesses, who were examined and cross-examined in that behalf, and the plaintiff rests his case here.

The defendant here interposes his motion for a nonsuit in said cause after argument by E. P. Johnson, esqr., of counsel for said defendant, for the motion, and the court being fully advised of and concerning the same, ordered: That said motion be and the same is hereby

29 overruled. To which ruling of the court said defendant by his counsel then and there excepted.

The defendant thereupon called as a witness L. A. Harkness, who was duly sworn and examined in that behalf. Whereupon said plaintiff, by his counsel, moves the court to strike out certain of the testimony of said witness. After argument by J. W. Huston, esqr., of counsel for said plaintiff, for the motion, followed L. P. Higbee, esqr., of counsel for said defendant, against the motion, ordered: That the same be and it is hereby overruled. To which ruling of the court the plaintiff by his counsel then and there excepted.

The defendant thereupon called as a witness H. O. Harkness, who was examined in that behalf, and the hour for adjournment having

arrived, ordered: That this court do now adjourn until to-morrow morn ing, Wednesday, July 21st, at nine o'clock a. m.

WEDNESDAY, *July 21st, A. D.* 1875.

Ninth judicial day of the United States and territorial district courts.

30 Court met and opened pursuant to adjournment.

Present, same as on yesterday.

When the following (among other) proceedings were had, to wit:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

Again this day came on this cause to be tried, the jury being called and found to be present, the said defendant recalled as a witness L. A. Harkness, who was examined & cross-examined in that behalf, and then called Katharine Harkness as a witness, who was sworn, examined, and cross-examined in that behalf, and defendant rests his case here.

Plaintiff here recalls B. F. White, who was examined & cross-examined in that behalf, and thereafter calls Henry Thomas as a witness who was examined in that behalf, and recalls Jordan W. Hyde, who was ex amined in that behalf.

Defendant here recalls H. O. Harkness as a witness, who was examined in that behalf, and the evidence was closed.

31 F. E. Ensign, esqr., thereupon addressed the court and jury in behalf of plaintiff, followed by E. P. Johnson, esqr., who addressed the court and jury in behalf of said defendant, and the hour for adjournment having arrived, ordered: That this court do now adjourn until to-morrow morning, Thursday, July 22d, A. D. 1875, at nine o'clock a. m.

THURSDAY, *July 22d, A. D.* 1875.

Tenth judicial day of the United States and territorial district courts.

Court met pursuant to adjournment.

Present, same as on yesterday.

When the following (among other) proceedings were had, to wit:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

Again this day was resumed the trial of said cause. L. P. Higbee, esqr., addressed the court and jury in behalf of said defendant, followed by J. W. Huston, esqr., who addressed the court and jury in behalf of the plaintiff, and the argument was closed.

32 The court thereupon charged the jury in writing and the jury retired to consider of their verdict.

Now comes the jury in said cause into court, and being asked by the court whether they had agreed upon a verdict, they handed to the court their verdict, which was thereupon recorded by the clerk, in the words & figures following, to wit:

"We, the jury, find the issues proved in favor of the plaintiff, and assess his damages at $3,500.00."

WEDNESDAY, *July* 28, *A. D.* 1875.

Fifteenth judicial day of the United States and territorial district courts.

Court met pursuant to adjournment.
Present, Hon. M. E. Hollister, judge.
When the following (among other) proceedings were had, to wit:

J. W. HYDE
vs.
H. O. HARKNESS.

Ordered, That judgment be entered on the verdict of the jury in said cause heretofore rendered.

33 Whereupon the following judgment was rendered and entered therein on the 28th day of July, 1875, viz:

Judgment.

In the district court of the 3d judicial district of the Territory of Idaho, in and for the county of Oneida.

JORDAN W. HYDE
vs.
H. O. HARKNESS.

This cause came on regularly for trial; the said parties appeared, by their attorneys; a jury of twelve men was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn & examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called answered to their names and say they find a verdict for the plaintiff, and assess his damages in the sum of thirty-five hundred dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, & decreed that said plaintiff, Jor-
34 dan W. Hyde, have and recover from said H. O. Harkness, said defendant, the sum of thirty-five hundred dollars, with interest thereon at the rate of ten per cent. per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of one hundred and twenty-three dollars and forty-five cents, and that execution issue therefor.

M. E. HOLLISTER, *Judge*.

Judgment, $3.500.00; costs, 123.45.
Rendered July 28th, 1875.
Entered " " " "

(Endorsed as follows:) In district court, 3d judicial dist., Oneida Co., I. T. Jordan W. Hyde vs. H. O. Harkness. Judgment-roll. Filed July 28th, 1875. E. A. Hollister, clerk.

35 Whereupon defendant (appellant) gave notice of motion for a new trial of said action, as follows, viz:

Notice of motion for new trial.

In district court, July term, 1875.

TERRITORY OF IDAHO,
County of Oneida:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

To Jo. W. Huston and F. E. Ensign, esqrs., att'ys for pl'ff:

Take notice that the defendant, H. O. Harkness, on Tuesday, the 3d day of August, 1875, at the court-room of said court, in Malad City, in said county, and at the hour of 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, will move this court to vacate the verdict and grant a new trial in said cause.

Said motion will be made and based upon the following grounds and assignment of errors, to wit:

1. Excessive damages appearing to have been given under the influence of passion or prejudice, to wit: the evidence does not show
36 that the pl'ff was damaged in an amount exceeding twenty-three hundred dollars, and not that amount positively.

2d. Insufficiency of the evidence to justify the verdict in this, to wit:

1st. There is no evidence to prove malice.

2nd. There is no evidence of facts and circumstances amounting to a want of probable cause for sueing out the process complained of.

3d. There is no evidence of damage to pl'ff from any wrongful act of the defendant in the premises.

3d. Errors of law occurring at the trial and excepted to, to wit:

1st. The court erred in permitting pl'ff to prove counsel fees as damages.

2. The court erred in refusing def't's motion for nonsuit, on the ground that the evidence wholly failed to show malice or a want of probable cause for the prosecution complained of.

3. The court erred in ruling out the deposition of Henry Riley, taken before Justice Evans, in the suit complained of, and showing that said Riley travelled with pl'ff, Hyde, and that he did travel the Beaver Cañon toll road, and drive his cattle over the same at the
37 time def't, Harkness, claimed toll therefor, and for which the prosecution complained of was instituted.

July 27, 1875.

Yours, &c.,

L. P. HIGBEE &
E. P. JOHNSON
Att'ys for Def't.

(Endorsed as follows:) In district court. J. W. Hyde vs. H. O. Harkness. Notice of motion for new trial.

We admit service of notice, of which the within is a copy, this 27th day of July, 1875.

HUSTON & ENSIGN.

Filed July 27th, 1875.

E. A. HOLLISTER, *Clerk.*

38 And thereupon filed the following motion, viz:

Motion for new trial.

In dist. court.

TERRITORY OF IDAHO,
County of Oneida:

JORDAN W. HYDE
vs.
H. O. HARKNESS.

Now comes the above-named defendant, by his attorneys, L. P. Higbee and E. P. Johnson, and moves the court to vacate the verdict and judgment heretofore entered herein, and grant a new trial of said action, upon the grounds stated in the notice of this motion and the statement herein filed, to which reference is hereby made.

L. P. HIGBEE AND E. P. JOHNSON.
Att'ys for Def't.

(Endorsed as follows:) In dist. court. J. W. Hyde vs. H. O. Harkness. Motion for new trial. Filed August 7th, 1875. E. A. Hollister, clerk.

39 And afterwards, to wit, on the 10th day of August, 1875, said motion for new trial came on to be heard before Hon. M. E. Hollister, chief justice and judge of said district court, at chambers, when the parties appeared by their respective attorneys, and argued said motion, and agreed to and used on the arguments on said motion, and submitted to the court the statement hereinafter set forth, which was filed in said cause.

Whereupon said judge made and entered the following order, viz:

Order granting leave to modify judgment.

Oneida County dist. court. July term, 1875.

JORDAN W. HYDE
vs.
H. O. HARKNESS.

And now, on this 10th day of August, A. D. 1875, the motion to vacate the judgment entered herein, and for a new trial, came on to be heard before me at my chambers, in Malad City, in said county, L. P. Highbee, esqr., attorney for the defendant, appearing in support of the motion, and F. E. Ensign, esqr., attorney for the plaintiff, in opposition thereto, and after a full hearing and due consideration thereof, it

40 is hereby ordered that a new trial be allowed in said cause, with costs to abide the event of the suit, unless within five days from this date the said plaintiff shall release and discharge the sum of one thousand dollars, part of said judgment, in which case the motion for vacating the judgment, and for a new trial, be and the same is hereby ordered overruled, and the judgment heretofore entered herein be modified so that the damages to be recovered by plaintiff from the defendant shall be for the sum of twenty-five hundred dollars, besides the costs of suit; and it is further ordered that the defendant shall have until the

first day of October next to appeal from the judgment so modified, and also from the order overruling the motion for a new trial, and for vacating said judgment, and that execution be in the mean time stayed.

M. E. HOLLISTER,
Judge of 3d Dist.

Malad City, Aug. 10th, 1875.

(Endorsed as follows:) In district court, 3d ju'al district, Oneida Co., I. T.

41 Hereafter, and on the 12th day of August, 1875, the following release was filed in said cause, viz:

Release of part of judgment.

In the district court of the third judicial district, held in and for the county of Oneida, & Territory of Idaho.

JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS, DEF'T.

Jordan W. Hyde, the plaintiff in the above-entitled case, does hereby remit and discharge the sum of one thousand dollars from the amount of the judgment, to wit (the sum of thirty-five hundred dollars and the costs of the said action), obtained by him against H. O. Harkness, the defendant in said action, in the district court of the third judicial district, held in and for the said county of Oneida, I. T., on the 28th day of July, A. D. 1875, and does hereby forever release and discharge the said H. O. Harkness and his heirs, executors, administrators, & assigns of and from the payment of the said sum of one thousand dol-
42 lars hereinabove remitted and discharged, and of every part and portion thereof.

Malad City, I. T., Aug. 12th, A. D. 1875.

J. W. HUSTON,
JOHN S. GRAY, &
F. E. ENSIGN,
Att'ys for Plaintiff.

(Endorsed as follows:) In district court, third judicial district, Oneida Co., I. T. J. W. Hyde vs. H. O. Harkness. Release of part of the judgment. Filed August 12th, 1875. E. A. Hollister, clerk.

43 And thereupon, on the 13th day of August, 1875, judgment was entered therein as follows, viz:

Modified judgment.

JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS, DEF'T.

Whereas the said plaintiff has remitted the sum of one thousand dollars, part and parcel of his damages awarded by the jury, on the 28th day of July, A. D. 1875, and has consented that the judgment entered in his favor against the said defendant for the sum of thirty-five hundred dollars damage, besides costs, shall be reduced to the sum of twenty-five

hundred dollars damage, besides costs: It is therefore hereby ordered and adjudged, that said judgment be modified, and that the plaintiff have and recover of and from the said defendant, in lieu of said judgment, the sum of two thousand five hundred dollars damages, and the costs by him expended herein, taxed at $123.45, and that he have execution therefor from and after the first day of October next, if no
44 appeal shall be taken by the defendant from the judgment entered herein before that day.

Done at chamber, at Malad City, this 13th day of August, A. D. 1875.

M. E. HOLLISTER,
Judge, &c.

(Endorsed as follows:) Jordan W. Hyde vs. H. O. Harkness. Order for judg't Aug. 13th, 1875. Filed August 13th, 1875. E. A. Hollister, clerk.

Whereupon said defendant (appellant) appealed to the said supreme court of Idaho from the above recited judgment and from the said order denying said motion for a new trial.

The following is a copy of the notice of said appeals:

Notice of appeal.

In district court.

TERRITORY OF IDAHO,
County of Oneida, ss:

45 JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS, DEF'T. } Action for damages.

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this Territory from the judgment made and entered in said action in said district court on the 28th day July, 1875, in favor of said pl'ff, and against said def't, and also appeals from the judgment made and entered therein on the 13th day of August, 1875, in lieu of the judgment first above mentioned in favor of said pl'ff and against said defendant, and also appeals from the order made and entered in said action on the 10th day of August, 1875, overruling said defendant's motion for a new trial of said action, and refusing such new trial in said district court (except upon a certain contingency therein expressed which did not happen).

Dated Sept. 30th, 1875.

Yours, &c.,

L. P. HIGBEE,
Att'y for Def't & Appellant.

46 To the clerk of said court and J. W. Huston and F. E. Ensign, esq'r's, att'ys for pl'ff & resp'd't.

ONEIDA COUNTY, *ss:*

L. P. Higbee, being duly sworn, says that he is attorney for the appellant and defendant above named, and that deponent has on this 30th day of Sept., 1875, deposited in the post-office at Malad City, in said

county, a copy of the foregoing notice of appeal, in an envelope, postage paid thereon, addressed to J. W. Huston, esqr., at Boise City, Idaho, his place of residence, and that deponent resides in said Malad City, and that there is a regular communication by mail between said Malad City and said Boise City; and further deponent saith not.

(S') L. P. HIGBEE.

Subscribed and sworn to before me this 30th day of September, A. D. 1875.

E. A. HOLLISTER, *Clerk.*

47 (Endorsed as follows:) J. W. Hyde vs. H. O. Harkness. Notice of appeal. Filed September 30th, 1875. E. A. Hollister, clerk.

48 The undertaking on said appeal from said order refusing a new trial is in the words and figures following, viz:

Undertaking on appeal, costs.

In district court.

TERRITORY OF IDAHO,
County of Oneida:

JORDAN W. HYDE, PL'FF,
vs.
H. O. HARKNESS.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the Territory of Idaho from the order made and entered in said cause in said dist. court on the 10th day of August, 1875, overruling said defendant's motion for a new trial of said action. Now, therefore, the undersigned, residents of the said county of Oneida, do hereby jointly and severally undertake and promise on the part of the appellant that he will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated Sept. 29, 1875.

W'M McCREA. [SEAL.]
MEYERS COHN. [SEAL.]

49 ONEIDA COUNTY, *ss:*

W'm McCrea and Meyers Cohn, the sureties above named, being duly sworn, each for himself says he is worth the sum specified in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

W'M McCREA.
MEYERS COHN.

Subscribed & sworn to before me this 29th day of September, A. D. 1875.

E. A. HOLLISTER,
Clerk District Court.

(Endorsed as follows:) District court. J. W. Hyde vs. H. O. Harkness. Undertaking on appeal. Filed October 1st, 1875. E. A. Hollister, clerk.

50 And the undertaking upon said appeal from said judgment, and to stay execution thereon, was in the following words and figures, viz:

Undertaking on appeal.

In dist. court.

TERRITORY OF IDAHO,
County of Oneida:

JORDAN W. HYDE
vs.
H. O. HARKNESS. } Action for damages.

Whereas the defendant above named appeals to the supreme court of the Territory of Idaho from the judgment made and entered against said defendant in said district court in said action in favor of the said plaintiff on the 28th day of July, 1875, for the sum of (as modified) twenty-five hundred dollars damages and one hundred and twenty-three dollars and forty-five cents costs of suit; and further appeals to said supreme court from the judgment made and entered in said action against said defendant in lieu of said first above-mentioned judgment in
51 said district court in favor of said plaintiff on the 13th day of August, 1875, for the same twenty-five hundred dollars damages, and one hundred and twenty-three dollars and forty-five cents costs:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, residents of said county of Oneida, do hereby jointly and severally undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas, the appellant is desirous of staying the execution of the said judgment appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of five thousand two hundred and fifty dollars ($5,250.00), being double the amount named in the said judgments, that if the said judgments appealed from, or either of them or any part thereof, be
52 affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

Dated Sept. 29th, 1875.

W'M MCCREA. [SEAL.]
MEYERS COHN. [SEAL.]

ONEIDA COUNTY, *ss:*

W'm McCrea and Meyers Cohn, the sureties in the foregoing undertaking, being duly sworn, each for himself says that he is worth the amount specified in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

W'M MCCREA.
MEYERS COHN.

Subscribed & sworn to before me this 29th day of September, A. D. 1875.

E. A. HOLLISTER,
Clerk District Court.

(Endorsed as follows:) District court. J. W. Hyde vs. H. O. Harkness. Undertaking on appeal. Filed October 1st, 1875. E. A. Hollister, clerk.

53 All of which proceedings, matters, and things hereinbefore stated and set forth appear in the transcript, duly certified from said district court upon said appeal.

On the 20th day of January, 1876, this cause came on for hearing in the said supreme court of Idaho, Chief-Justice Hollister and Associate-Justice Clark presiding. Upon said respondent's motion as follows, to wit:

Bill of exception. Motion to dismiss.

To dismiss the appeal to this court by the said appellant from the order made and entered on the 10th day of August, 1875, in the district court of the 3rd judicial district held in and for the county of Oneida, I. T., overruling the motion for a new trial in said court made by the said H. O. Harkness, defendant therein, and appellant in this court, on the grounds following, to wit:

1. That the undertaking filed in the said appeal to this court is insufficient in this, that it does not contain the conditions prescribed in section 440 of the act to regulate proceedings in civil cases in the
54 courts of justice in Idaho Territory, and that the affidavit of the sureties attached thereunto, does not state that the said sureties were residents and householders within said Idaho Territory.

2nd. That the said appeal was not taken and that the notice of said appeal was not made, or given, or filed in said district court, or served upon said respondent or his attorneys or any or either of them within 30 days after the said order overruling the said appellant's motion for a new trial was made and entered in said cause in said district court.

F. E. ENSIGN AND
HUSTON & GRAY,
Att'ys for Respondent.

(Endorsed:) Filed Jan'y 19th, 1876. A. L. Richardson, clerk.

55 *Motion to strike out statement.*

To strike out the statement on the motion for a new trial contained in the transcript filed herein on appeal in said cause on the following grounds, to wit:

1st. That the undertaking filed on appeal from the order of the district court of the 3d judicial district, held in and for the county of Oneida, Territory of Idaho, made on the 10th day of August, 1875, overruling the said appellants' said motion for a new trial is insufficient in this, that it does not contain the conditions prescribed in section 440 of the act to regulate proceedings in civil cases in the courts of justice in Idaho Territory, and that the affidavit of the sureties therein attached thereunto, does not state that the said sureties were residents and householders or freeholders within the Territory of Idaho.

2d. That the said appeal was not taken, and that the notice of said appeal was not made or given or filed in said district court, or served upon said respondent or his attorneys or either or any of them within 30 days after the said order overruling the said appellant's motion for a
56 new trial was made and entered in said causes in said district court.

3d. That the said statement on motion for a new trial was never presented to the judge of the said district court for settlement or allowance as prescribed in section 211 of the said act now and then in force in said Territory, and was never settled or signed or certified to or allowed by said judge.

F. E. ENSIGN AND
HUSTON & GRAY,
Att'ys for Respondent.

(Endorsed:) Filed Jan'y 19th, 1876. A. L. Richardson, clerk.

57 The statement aforesaid is in the words and figures following, viz:

Statement on motion for new trial.

In dist. court, July term, 1875.

TERRITORY OF IDAHO,
County of Oneida:

JORDAN W. HYDE
vs.
H. O. HARKNESS. } Statement on motion for new trial.

This action came on regularly for trial at said term of said court and was tried by a jury.

The plaintiff introduced and read in evidence the docket entries, complaint, affidavit for attachment, and writ of attachment in the suit of H. O. Harkness vs. Jordan W. Hyde, in justices court, before R. G. Evans, a justice of the peace in Malad precinct, in said county, which show that on the 7th day of July, 1873, said suit of Harkness vs. Hyde was commenced before said justice for the sum of eighty-three dollars, and an attachment issued, and that said attachment was served on the 10th day of July, 1873.

That said suit was tried in said justice's court on the 22d day of July, 1873, by a jury, and a verdict found by said jury for the defendant
58 therein, and a judgment for costs was accordingly entered by said justice against said Harkness in favor of said Hyde, and the property attached was ordered to be returned to said Hyde, and that said judgment for costs was paid at once, and that was the final termination of that suit. And that the sum sued for therein was claimed to be due for toll for use of the Beaver Cañon toll road in said county by driving a herd of cattle over the same, kept by said Harkness.

That said suit was continued, after return of summons, to 21st July, 1873, on affidavit of pl'ff therefor, and then continued to said 22d day of July by consent of the parties pl'ff and defendant therein.

Said record further shows that said attachment was levied in Oneida County, and that said attachment, the second issued in said action, was issued on bond filed, the sureties in which duly justified as to their responsibility.

The following is the itemized account of the toll charged, as stated in the said complaint, to wit:

59 June 29th, 1873, to toll on 302 head of loose stock over the Beaver Cañon toll-road, at 25 cents each $75 50
June 29th, 1873, to toll on 15 saddle animals over the Beaver Cañon toll-road, at 50 cents each 7 50

$83 00

Evidence of J. W. Hyde.

JORDAN W. HYDE, plaintiff, called & sworn, and testified as follows; I reside in Madison County, Montana; resided there in July, 1873: have lived there for the last 8 years. On the last day of June or 1st day of July I passed the stage station at Port Neuf Cañon, and took the Subletts cut-off; was driving cattle; 25 of my cattle were taken from me near where Toponce keeps his herd; they were seized by an officer, by virtue of a writ of attachment; Harkness was present; it was said to be for toll on the Beaver Cañon toll-road. I never travelled his road. I didn't think I owed him any toll. I did not pass through any of the gates on that road with any of my cattle. We camped some 3 miles above the Beaver Cañon toll-gate. I told my son to go to the gate to see if he would let us through for $15 or $20, and tell him we had
60 not used the road, nor did I want to go over that mountain.

When I got to the toll-gate my son was there. I asked him if he had made any arrangement. He said he had not. That brought me to Harkness' brother, the toll-keeper. He said he would pass us through at 10 cents per head; that was the least he could do. I told my son to fall back, and we would pass over the mountain. We did so; drove the cattle over the mountain; that is, my son did. I passed through the gate with my wagon. It was some considerable time, perhaps 15 days after that, that the property was attached. At the time the property was attached the first time, Harkness and the officer came there and wanted me to pay $83.00 toll. If I did not pay it they would attach my cattle. It was the defendant in this action who was present. I told him I didn't owe any toll, and I shouldn't pay any.

On the next morning they came and was talking about the arrangement, and I asked them to favor me by taking the tail end of the herd or band; that I considered I had sold 200 head, and it would not
61 stop me from going on by taking the tail end of the herd. If they took my best cattle it would cut me off from accomplishing my sale; that I would as soon that they took them all as to take the best. Something was said about attaching a pair of mares I had. I objected to it, and they didn't do it. I told them that I objected to it because the herd belonged to me, every hoof of it; not to attach my mares; that the herd was sufficient to pay any debt that I owed.

Harkness insisted on the officer taking mares, but finally they cut off my best stock, 25 head; they were all on the move, and they went to the front of the herd; they got 2 of Poindexter's cattle, and I told them I didn't want them to take his cattle to pay my debts, so they changed them; they took 25 head of stock—23 four-year-old steers and 2 cows. The stock they took was worth $1,000, the 25 head. I was driving the cattle under a contract to get 8 cents per pound, I thought, but I got there too late. I was to get 8 c'ts per lb. for cattle that would weigh 600 lbs. and upwards. Two hundred of my band would come under that head. By reason of that attachment, I was detained, I think,

62 about 20 days. I was paying 4 men $40 *dollars* per month; consider my time worth that.

Question. What expenditures did you undergo, including counsel fees, by reason of that attachment?

(Def't, by his counsel, objects to the question, for the reason that plaintiff is not entitled to recover counsel fees.)

Answer. I employed counsel to defend that suit, one H. W. O'Margary and J. W. Huston. I paid, I think, $100. The four men I had employed were detained here all that time by reason of that suit. After the attachment was released I had to get the stock to the herd the best I could. I hired a man to go to the herd and get help. I had trouble getting it there. Was all one day and most of the night. I gave the man $10 to go and stop the herd and have them come back and help me. I finally took the herd to Nevada and disposed of them there, after a long while. I was driving the cattle to Nevada, and expected to get 8 c'ts per lb. from my son, a butcher, if I got them there in July or August. A month or six weeks before I got to Nevada cattle were
63 selling at 8 c'ts; can't tell their value 20 days previous.

When I got there, the last of August, cattle were low; no sale. I thought I lost $10 or $12 per head by reason of the detention. Had I not been detained here I would have arrived at Nevada 20 days sooner. Stock had been selling at 8 c'ts a short time before I got there. I think I could have got 8 c'ts had I arrived there 20 days sooner. My opinion is based upon information derived from stock and market men. The stock was in Idaho Territory during the attachment.

I paid my 4 men $40 per month and their expenses while they were here; it was about $2.00 per day expense for them and $2.00 per day for myself.

Jordan W. Hyde, on cross-examination by defendant's counsel, amongst other things, testified as follows:

I have travelled on the Beaver Cañon toll-road for the last 10 years; have had a good deal of stock pass over the road. I knew Harkness kept the toll-road; did not know who owned the road; my stock
64 was in sight of the toll-gate on the side of the road, camped; when I went to the gate to make arrangements to pass through I was travelling with a wagon at the time. There was a stranger with me that I picked up on the road. I passed through the gate and over the road with my wagon. I paid the toll; young Harkness seemed to be offended that I did not pay the 10 c'ts for the cattle; he made no compromise with me; he may have tried to compromise with my son. I had some 15 or 16 head with me belonging to Poindexter. I don't think Harkness made any other demand of me than for toll; when he demanded the toll I told him I owed him nothing; that I had not travelled the road. There was nothing said by Harkness about taking the best stock to make the money on the attachment that I heard; my cattle were lying by at the time I was detained there; they were improving, and improved when I drove them; don't know that they were really better when I got to Nevada by reason of the detention; while I
65 was detained I stopped them awhile at Malad Springs, then moved them on over the mountains, some 30 miles.

Evidence of Richard Thomas.

RICHARD THOMAS, called and sworn for plaintiff, and testified, among other things, as follows:

I was constable in July, 1873. On or about July 11th I received from

Justice Evans a writ of attachment and summons in Harkness vs. Hyde. I went up the 1st day or 2d morning to Harkness. He thought my horse was not fit to go, and wanted me to wait until next morning, and he would go with me. We travelled until between sundown and dark; then we saw the wagon on a bench on the upper side of the road and the herd on the lower side. Hyde was sitting on the spring seat of the wagon. I said, "Folks, have you any water here." I then said, "Are you M'r Hyde." I said, "I have got a subpœna for you." "That's all right says he." I then read it (I mean a summons). Harkness had not directed me at all then. Harkness told me that I had better
66 subpœna Hyde that night to appear at Malad, and to attach the cattle the next morning. Harkness told me to attach cattle that would sell. Harkness told me to attach enough. He told me before that that he wanted me to attach the team. This was told me in camp the night before the attachment and afterward. The next morning after breakfast we went back, and met Hyde with his herd. Hyde was with the team driving ahead of the herd. Says I, "I have come back here to attach this morning." Says he, "It is all right." Then he hailed one of the boys. Harkness, myself, and Henry Thomas were there. He stopped the cattle and turned them into a bend. We took so many head out. Harkness was the director. I could not take my own way. Harkness told me twice to take enough. By the direction of Harkness I turned the stock over to Henry Thomas I served writ of attachment by direction of Harkness. Hyde said to Harkness, "I wish you would take the tail end of the cattle." Harkness says to me, "You will be foolish to take the tail end of the cattle, for you want some you can sell." I said I wanted to take
67 something I could sell myself. Hyde said, "I have made arrangements to deliver so many head, and I would rather you would take the tail end of the herd." We thought it wouldn't make much difference. We wanted to be sure ourselves.

This witness stated on cross examination as follows:

Harkness told me to take the fat cattle. Harkness and I had been talking all along the way. He said we would take something to make our money out of. Harkness told me to attach Hyde's team. That was on the morning when we went back and met Hyde's herd. I don't recollect that Harkness gave me any reason why I should levy on Hyde's team. I don't know as we talked about the team until we met them that morning. We did not take the team. I thought that was not wise. I didn't want to. I acted under his (Harkness') instructions. When I took the cattle out he told me to take fat cattle. He told
68 me to take enough cattle to pay the expenses of the lawsuit—to pay the expenses of the whole thing—of the toll and suit. By the toll-road expenses I mean the toll. H. O. Harkness assisted me in driving the 25 head of Hyde's stock from the front when we took them from Hyde's band, and a part of the way to Malad City. He di l not go with me all the way. He said he did not want to come all the way; that Thomas could help. He told us to drive them to town that night. We did so. I had to have some one to assist in driving the cattle.

RICHARD THOMAS was recalled and testified further on behalf of the plaintiff, as follows:

I think it was the forward part of the herd we took the cattle from. We did not take all the cattle at once. We first took 18 head; then went back and took 7 after we took the 18. We all three of us, Henry

Thomas, Harkness, and myself talked together, and I think it was Henry Thomas told me we had not got enough; to go back and get more, 7 head. I don't recollect who assisted me in turning out the last 7 head. I don't believe there was anybody there except Hyde,
69 Henry Thomas, and myself. I don't know where Harkness was. I think he was 2 or 3 hundred yards away, and in sight of us.

On further cross-examination the witness stated that he served two writs of attachment.

Here the pl'ff rested, and def't interposed his motion for nonsuit upon the grounds that the evidence failed to show a want of probable cause for the prosecution complained of, and also failed to show malice.

The court denied said motion for nonsuit, and the defendant, by his counsel, did then and there except thereto.

Def't here introduced and read in evidence an act of the legislative assembly of the Territory of Idaho, entitled "An act to authorize William Murphy to construct and maintain a toll-road in Oneida County, I. T., running from Camas Creek, in said county, in a northerly direction through Beaver Cañon to the southwestern boundary-line of Montana Territory," approved December 18th, A. D. 1866, on page 154 of the printed laws of the 4th session.

70 *Evidence of H. O. Harkness.*

H. O. HARKNESS was then sworn and testified in his own behalf as follows:

I am def't in this suit. I became acquainted with W'm Murphy in the winter of 1867 or the spring of 1868. I have known the Beaver Cañon toll-road since the fall of 1867. When I first knew the road W'm Murphy was the proprietor. He continued to be the proprietor until his death, April 11th, 1870. He was a married man, to the best of my knowledge. His wife told me she was married to him in 1860. I know that they were living together as husband and wife up to the time of his death in 1870.

Murphy left no children when he died, nor grand children, or other descendants, to my knowledge. When he died his wife took possession and ran the toll-road after my lease expired which I had from Murphy. I was in possession of the road by lease from Murphy from Dec. 1st, 1869, until April 1st, 1870. After Murphy's death I became the husband of M'r's Murphy, Aug. 17th, 1871. I continued to be her husband, and was at the time of the suit complained of. I had the control
71 and management of the toll-road from the expiration of my lease up to the time of my marriage with M'r's Murphy, as her agent. Since my marriage to her I have had the control and management of the road, and the collection of toll.

I was collecting the tolls of the Beaver Cañon toll-road in July, 1873, through an agent. That agent was L. A. Harkness. I did not know the pl'ff in this case up to July 2d, 1873; did not know that there was such a man as Jordan W. Hyde.

On the 2nd day of July, 1873, I received a letter from my brother, L. A. Harkness.

(The letter referred to was here shown witness and identified by him, and was marked "Exhibit A.")

On the reception of the letter, I considered the matter in my own mind, and then I came to Malad City, where I consulted with L. P. Higbee, as counsel. After reading the letter to L. P. Higbee, I asked

his advice whether to sue or not. He advised me to commence a suit. L. P. Higbee was my retained counsel at and before that time. I did, at that time and at previous times, consult with him as to whether I had authority to collect toll.

72 I had submitted the same question to other counsel learned in the law—Maj. Hempstead, of Salt Lake; E. P. Johnson, of Corinne; E. J. Curtis, of Boise City; Thoroughman & Davis, of St Louis, Mo.; and V. S. Anderson, of Boise City.

The advice from my said counsel was uniformly that I had a right to collect toll on the Beaver Cañon toll-road until the charter was annuled. It was uniformly the same with all whom I consulted.

I submitted the letter referred to to my said counsel, L. P. Higbee. I told him where the cattle came on the road and where they left the road, according to the information I had received. I also told him of compromises that had been offered, to the best of my information. I stated the distance up to that place in regard to the costs of witnesses, &c., and I finally asked his advice whether to sue or not. I stated that it was about 200 miles up to that gate, that the witnesses lived along the road, and that it would be an expensive suit. I said it was advisable to wait until the party was near Malad, to lessen costs of

73 suit. It was agreed between us (my counsel and myself) that we would wait until the party got down nearer, and the suit was not commenced until July 7th. The object of the delay in commencing the suit was to save unnecessary costs in traveling-expenses.

There was an attachment issued and acted upon, and I supposed it was all right; but my counsel, in looking over some decision, saw that it was not according to law, consequently there was another attachment issued.

(Here counsel for def't admitted that the undertaking was defective upon which said first writ of attachment was issued.)

I think there was no additional expense made in getting out the new attachment, so far as the herding and keeping of the cattle was concerned. The same officer took care of them, I think. I know I paid the bill, when the first attachment was dismissed and a new one was issued by the advice of counsel. I followed the advice of my counsel, who were L. P. Higbee & E. P. Johnson. The various counsel I

74 have mentioned as consulting were said to be attorneys at law, and were acting as such.

The stock under the attachment were in the custody of the officer from the 10th of July to the 22d of July, in the afternoon, inclusive.

I made a suggestion to the officer to take a pair of mares for the reason that M'r Hyde said he did not want his cattle taken; but it was only a suggestion, not a direction.

The distance from the Beaver Cañon toll-gate to the point where the cattle were levied upon is about 170 miles.

On cross-examination this witness further testified as follows:

From Aug. 17, 1871, to the commencement of said suit I was managing the road and collecting the tolls for myself and wife. It was a family matter, and I was the head of the family. My authority was derived from my marriage with my present wife.

One hundred and seventy miles is the traveled route from Beaver Cañon to where the cattle were levied upon.

L. A. Harkness.

L. A. HARKNESS was called and sworn as a witness for def't, and testified as follows:

75 In the month of July, 1873, I was collecting toll at Beaver Cañon for my brother, H. O. Harkness, the def't in this suit. I was acting as his agent. I saw pl'ff, Hyde, two years ago for the first time.

On the 29th of June, 1873, I think, when I got up in the morning, I saw a herd of cattle on the road partly and just at the side of the road. That was a mile or a mile and a quarter above the gate. An hour or an hour and a half after that a man came to the gate and said he had a herd of cattle there which he wanted to pass down over the road through the gate. He wanted to know what the toll would be on it. I asked him how many he had. He said he had 167 head. I believe he said he had eight herd or saddle horses. I told him it would be $16.70. He said that was too much, and he wouldn't pay it. To avoid any further trouble I told him he could pass for $10.00. He said that was too much. He offered me, I think it was, five dollars. I told him I couldn't take it.

76 A minute or two after that Jordan W. Hyde, the pl'ff in this case, came up in a wagon. He asked me what the toll was on his team. I told him and he paid it. While he was paying it he spoke to the other man and asked him if he had made any arrangement about the cattle. He told him he had not. Pl'ff then told the other to go back and turn them over the trail over the hills. The son went back and Hyde came this way. I have learned since that it was Hyde's son that came to the gate at that time and tried to negotiate for the passage of the cattle through the gate. The $16.70 was the regular rates of toll for the number of cattle he had given in to me. I thought from the appearance of things there was liable to be trouble, and I thought it better to compromise for $10.00. I was not charging the full rates specified in the charter when I charged $16.70. I wrote a letter to my brother on the 29th June, the same day when I saw the cattle, and the man came to negotiate, and pl'ff passed the gate.

(The letter marked "Exhibit A" was here shown to witness, and he said it was the letter before mentioned that he wrote to def't.)

77 On cross-examination this witness further stated as follows:

Hyde's son told me that they had not used the road, and did not want to, on account of the cattle's feet. I had conversation with Jordan W. Hyde, but it was short. I do not remember of telling Hyde's son that if they had traveled within two miles of the road that they would have to pay toll. It is hard to get a herd of cattle all on the road. I have been attending that gate at different times. The last time I came there was October, 1872. The customary rates of toll for loose stock of that kind was ten cents per head. I got the information about their using the road from the boy. There is a bulletin-board at the gate. The rates on it are the same as in the charter, but the rates charged are 10 cents.

Catharine Harkness.

M'r's CATHARINE HARKNESS was introduced and sworn as a witness on behalf of the defendant, and testified as follows:

On December 18th, 1866, and prior thereto, I was the wife of William Murphy, who received a charter to keep a toll-road at Beaver

73 Cañon. My husband, W'm Murphy, died, leaving no children, or children's children, or other descendants.

Defendant then offered in evidence the deposition of Henry Riley, which was taken, by consent of parties pl'ff and def't, and read as evidence in said suit of Harkness vs. Hyde, and remains on file, with other papers in that suit, in the justice's office.

The pl'ff, by his att'ys, objected thereto on the ground that the same was irrelevant; the court sustained said objection, and the def't, by his att'ys, excepted to such ruling.

The following is a copy of said deposition, and the certificate thereto annexed, so offered and rejected.

Deposition of Henry Riley.

In justice court.

I. TER., *Oneida Co.:*

H. O. HARKNESS }
vs.
JORDAN W. HYDE. }

Deposition of HENRY RILEY, taken by consent of said parties. Sworn.

Q. What is your name, age, residence, and occupation?

79 A. Henry Riley; 20 years; no place of residence at the present time; plumber & gas-fitter by trade.

Q. Are you acquainted with M'r Hyde, def't, and M'r Harkness, pl'ff?

A. Yes.

Q. Were you not traveling with M'r Hyde about the 29th of June?

A. Yes; from Williamson Junction to this side of Yam Patch on stage road.

Q. Do you know where Beaver Cañon toll road is?

A. Yes; but I do not know where it commences.

Q. Did you and M'r Hyde travel over the Beaver Cañon toll road?

A. Yes; we came over the whole road.

Q. State as near as you can the time that M'r Hyde traveled over the Beaver Cañon toll road.

A. About the beginning of July, 1873; I do not remember the day of the week or month, but it was about that time.

80 Q. State what, if any, live stock M'r Hyde had under his charge and was driving over the road at that time.

A. He had horses and cattle, 298 head of cattle, and 16 horses among the cattle, 4 saddle horses and two in, hitched to the wagon.

Q. State whether he drove the stock that you have mentioned, over the whole of the Beaver Cañon toll road or not.

A. He did not drive them over the whole of the Beaver Cañon toll road; but on this side of the gate, and on the other side of the gate; but he did not pass through the gate.

Q. Which way were you driving the stock?

A. Coming this way.

Q. How near to the toll-gate did M'r Hyde drive his stock on the other side?

A. Within a mile or less.

Q. Where did he drive them then?

A. Over the mountain to Dry Creek, about a mile and a half or two miles from the toll-gate on this side. He came back on the toll road and camped there that night, and came on down the road; they
81 were off and on the road from there down. They followed the road.

Q. State whether you heard any conversation by M'r Hyde, the def't, with reference to passing the stock you have mentioned through the toll-gate; and, if so, what that conversation was.

A. He sent his son to the toll-gate from where the cattle was, about a mile from the toll-gate on the other side, to see if he could pass them through for $3½ or $3.75. He told his son to go to the gate to see if he could make a bargain to let the stock through for $3.50 or $3.75, and if he asks you how many head of cattle we have got, tell him we have got 298 head. When M'r Hyde, the def't, came up to the toll-gate he asked his son if he had made a bargain; the son said no. M'r Hyde, the def't, told his son to put them over the mountain. His son went back and put the cattle over the mountain from off the road.

Q. State whether M'r Hyde drove his herd of horses and cattle that you have mentioned down the stage road from Montana, all the
82 way to the point you have mentioned above the toll-gate where they were driven off the road over the mountain.

A. Not on the road all the time, but they followed the road all the way.

Q. How far down the road on this side of the toll gate did M'r Hyde, def't, drive the stock?

A. To Yam Patch Station—as far as I came with him.

Cross-examination:

Q. You say you are a plumber & gas-fitter by trade; is that the occupation you have followed for the last year?

A. No.

Q. What has been your business or occupation for the past year, and where has been your residence?

A. My occupation was chopping wood last winter; this spring mining; my residence has been since last July on Middle Creek and Virginia most of the time, the balance of the time in Pennsylvania.

Q. When did you leave the State of Pennsylvania?

A. The spring before last fall.

83 Q. Where did you go from Pennsylvania?

A. I went in to Helena.

Q. When did you reach Helena?

A. In the month of May, 1872.

Q. Have you resided at any other place in Montana besides Middle Creek, Virginia; if so, where?

A. No.

Q. How do you know that there is such a toll road as the Beaver Cañon toll road?

A. I saw it printed up at the toll-house door.

Q. Do you know where the commencement or terminus of the Beaver Cañon toll road is?

A. As I have stated before, I do not.

Q. Do you know how far the defendant, with his stock, traveled what you call the Beaver Cañon toll road?

A. We traveled to within a mile of the toll-gate on the other side. I do not know the distance.

Q. Was there more than one roadway or track on the route the defendant was traveling?

84 A. There are plenty of roadways or tracks; none of them traveled but one.

Q. Is that one fenced?

A. It is not fenced.

Q. Do you mean to say that the def't traveled and drove his stock entirely in one track or roadway?

A. No; I do not.

Q. How came you to be in company with the def't?

A. I was traveling, and overtook him, and camped at night with him.

Q. How were you traveling?

A. On foot.

Q. How long did you remain in company with the def't?

A. I guess about two weeks.

Q. Were you in the employ of the def't?

A. No.

Q. How did you travel after you joined the def't?

A. On his wagon.

Q. About what distance did the def't travel daily after you joined him?

85 A. Averaged from 8 to 14 miles a day.

Q. What portion of the time you were so traveling with the def't were you in sight of his herd of cattle?

A. I was in sight of it most of the time right straight along.

Q. Did you at any time see def't's herd of stock in the road along the toll road?

A. Yes.

Q. When did you see them on the road?

A. When he sent his son from them to the toll road.

Q. What time of day was it that def't sent his son to the toll-gate?

A. In the morning; about 8 o'clock in the morning.

Q. How far had the stock been driven that morning?

A. The stock had not been driven at all; they were where they camped overnight.

Q. Where did you leave the company of def't?

A. On this side of Yam Patch Station.

Q. Why did you leave the company of def't?

A. He told me to leave.

86 Q. Did he give you any reason for telling you to leave?

A. No.

Q. In what vocation did you leave Pennsylvania?

A. I came to hunt for gold. I left in no vocation but to travel to this country.

Q. Where did you go when you left Helena?

A. To Middle Creek.

Q. Did you while in company with the def't hear him direct the men in his employ to keep the stock out of the road?

A. Yes.

Q. Do you know what is the distance from the point where you overtook the def't to the point where you parted company with him?

A. No.

Q. Did you ever see the stock of the def't traveling in the Beaver Cañon toll road, in the road track?

A. Yes.

Q. How often?

87 A. I could not tell how often, but I saw them in it on the other side of the toll-gate.

Q. How often did you see the stock in the road track on this side of the toll-gate?

A. They were in it at noon and at night when they camped.

Reexamined by pl'ff's att'y:

Q. Is the toll-gate you have mentioned at the toll-house where you saw the board with the words on it Beave' Cañon toll-road?

A. Yes.

Q. State whether the def't passed through the toll-gate with his wagon and team; and, if so, whether or not he paid toll.

A. Yes; he passed through the gate with his team and wagon and paid 75 cents toll.

(Signed) HENRY RILEY.

I, R. G. Evans, justice of the peace in and for Malad precinct, Oneida County, Idaho Territory, hereby certify that the above and foregoing deposition was taken before me by agreement of the parties to said action, and was by me reduced to writing on the 17th day of July,

88 A. D. 1873, and that the witness was by me sworn to testify the truth, the whole truth, and nothing but the truth, and that the same was read to said witness and by him subscribed in my presence.

(Signed) R. G. EVANS,
Justice of the Peace.

Def't also introduced and read in evidence the aforesaid letter, marked "Exhibit A," of which the following is a true copy:

EXHIBIT A.

BEAVE' CAÑON TOLL GATE.
June 29th, 1873.

DEAR BROTHER: This letter I write in regard to a herd of cattle which has run the gate. I will tell you the circumstances as near as I can. For the last two days I have heard that there was a big herd of cattle coming down the road. This morning when I got up, a little before five o'clock, I saw the herd on the hills this side of the Dive Hill. It was not long until a man came down here and said he had a herd of cattle of 167 head, 7 herd horses, one wagon, one span upon the bluff. If I would pass them reasonable he would come this way. If not he would go over the hills. He said he had not traveled on the road or did not want to travel on the road on account of the cattle's feet. I

89 saw by the way he talked there was liable to be trouble to get the toll, so I offered to pass the outfit of 176 cattle and wagon, &c., for $10.00. Just then an older man came up with a wagon and one span; asked me what his toll on that team was. I told him and he paid it; then he asked the first man that came if he had made any arrangements yet. He told him no. He (the old man) told the other to go back and drive the herd over the hill; to take that trail which starts in this side of the Dive Hill.

Now, the boy that lives at the valley was just here; he says one of the men helping drive the cattle told him that there was 302 head, and that they passed the valley on the road a d corralled their horses there to catch some of them, and that there was about 15 or 20 head of their

horses. They said at the valley they were going over the trail to miss this gate, and going over the Bannock Mountain to miss the Port Neuf gate.

The boy from the valley says the man in charge of the herd, and the biggest owner in the herd, name is Hyde. He is the old man that came up here in the wagon, and the young man came first; his name is Hyde, the old man's son. The man that came first (Hyde) said a part
90 of the cattle belonged to Poindexter & Orr, that live in Beaver Head. I sent this morning Horatio, the man that works here, over in the hills with a gun to let on that he was hunting, to find out all he can about the number of the cattle, the owner, &c. Horatio just came back. He rode along with young Hyde and had a talk with him. Hyde did not know for a long time that Horatio belonged here. Hyde said he supposed the toll could be collected, but he did not think we would ever bother with it, and that the herd belonged to Jordan, Hyde, and Poindexter.

The old man Hyde told his son this morning to give five dollars toll. When Horatio left the herd it was going toward the road and was not over a half mile from the road. That was this side of Little Dry Creek. Now this is a very aggravating case, and if you claim you can collect toll on this road by law, I think you will never have a clearer case, and if you expect much toll after this on herds you will have to collect this or they will all play the same game.

(Signed) L. A. HARKNESS.

P. S.—The old man Hyde which came up in the wagon was one
91 of the owners, and in charge; was very indignant; would not talk at all; said he would pay when it was collected. The number of the stock, all I know, is what the boy at the valley says.

(Signed) L. A. HARKNESS.

H. O. HARKNESS, the def't, being recalled, further testified as follows:

After talking the matter over with my counsel he advised me to charge charter rates for toll, which is 25 cents per head for loose stock and 50 cents per head for saddle-horses. In consulting, I stated to my counsel that there was an order of the board of commissioners of Oneida County reducing the rates of toll on the Beaver Cañon toll road. He said he thought it would be best to test the order by charging charter rates. He advised me to charge and collect charter rates. I was advised that the order of the board of county commissioners was in violation of my charter rights. The sum for which I brought suit for before Evans, J. P., against Hyde was the sum allowed for toll in the charter.

92 Def't rested here, and plaintiff introduced and read in evidence the record of a trust deed from W'm Murphy to Davis and Thoroughman, dated October 30th, 1867, and recorded Nov. 2nd, 1867, at request of said Murphy, as appears by said record; by the terms of which said deed the said W'm Murphy conveyed all his right, title, and interest in said Beaver Cañon toll road (with other property) to said Davis and Thoroughman in trust for the said Catherine Murphy.

B. F. WHITE was then called, and testified as follows:

I am the county recorder of Oneida, I. T., and the custodian of the records. The trust deed introduced in evidence in this case from Murphy to Davis and Thoroughman is on record in the recorder's office in

said county, but there has been no transfer since of the title to property or any portion thereof described in said trust deed placed on record or filed in said office.

As to whether said trust-deed was accepted by said Davis & Thoroughman, H. O. HARKNESS re-called, said:

In the spring of 1868 I made an arrangement with B. D. Maxon, of Virginia City, Montana, at that time to take a lease that he had on
93 the Beaver Cañon toll road. The said lease commenced in the spring of 1867 and expired Dec. 1st, 1869. In that lease there was certain work to be done on the road. The original trust-deed, the record of which has been read in evidence, I found among the papers of W'm Murphy after his death. I subleased from B. D. Maxon, and had the road in my possession from the spring of 1868. I had it deeded over to me by Davis and Thoroughman in March or April, 1874.

I had a conversation with Davis and Thoroughman, in S't Louis, in March or April, 1874. They stated to me that they had never paid any attention to the matter of the Murphy property, and had as lieve as not deed to me all estate vested in them by said trust deed. That is the substance of the conversation. I wouldn't say that those are the exact words. They executed a deed to me, at that time, of all their rights in said property.

Here the evidence closed.

94 *Assignment of errors.*

Errors in law, as alleged by def't:

1. The court erred in permitting the plaintiff to prove counsel fees in the prosecution complained of as an item of damages.

2. The court erred in refusing defendant's motion for a nonsuit, because the evidence failed to show malice, or a want of probable cause for the prosecution complained of.

3. The court erred in ruling out the deposition of Henry Riley, taken by consent of parties, and read in evidence on the trial of said suit of Harkness vs. Hyde before said Justice Evans, and showing that said Riley traveled with plaintiff, Hyde, and that he did travel over the Beaver Cañon toll-road, and drive his cattle over the same, at the time this defendant, Harkness, claimed toll therefor from pl'ff, Hyde, and for which toll the prosecution claimed of was instituted.

We do hereby certify that the foregoing statement has been agreed upon by us, and is correct; and we further certify that the same
95 contains all the material evidence introduced on the trial of said action.

Dated Aug. 9, 1875.

L. P. HIGBEE, *Att'y for Def't.*
J. W. HUSTON & ENSIGN,
Att'ys for Plaintiff.

(Endorsed as follows:) In district court, 3d jud'l dist., Oneida Co., I. T. Jordan W. Hyde vs. H. O. Harkness. Statement on motion for new trial. Filed August 10th, 1875. E. A. Hollister, clerk.

96 Said motions were both argued together, by direction of the court, and submitted; whereupon the court made the following order sustaining the same, viz:

Order dismissing motion for new trial & striking out statement.

Ordered, That the appeal from the order overruling (def't's) appellant's motion for a new trial be, and the same is hereby, dismissed, and that the statement used on the hearing of said motion be stricken from the record.

To which order striking out said statement the said appellant, by his counsel, did then and there duly except, for that the same is error and against law, and said exception was allowed by the court.

(Signed) M. E. HOLLISTER,
Chief Justice, Idaho Territory.

(Endorsed as follows:) Filed March 22d, 1876. A. L. Richardson, clerk.

97 *Judgment of supreme court, I. T.*

In supreme court, Idaho Territory, January term, 1876.

H. O. HARKNESS, APPELLANT,
vs.
JORDAN W. HYDE, RESPONDENT.

This cause came on for hearing at this term, to wit, January 29, 1876, upon the appeal from the judgment of the district court, and the attorneys for the parties, respectively, appeared and submitted said cause to the court for decision upon written briefs and arguments.

Whereupon the said supreme court rendered its judgment affirming the judgment of the said district court, as follows:

On appeal from the district court of the third judicial district, in & for the county of Oneida:

H. O. HARKNESS, DEF'T & APPELLANT,
vs.
JORDAN W. HYDE, PL'FF & RESPONDENT.

98 And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Associate Justice John Clark to the effect that the judgment of the court below be affirmed, at appellant's cost.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the third judicial district, in and for the county of Oneida, in the above-entitled cause, be, and the same is hereby affirmed at appellant's costs.

To which decision and judgment of said supreme court the appellant, by his counsel, then and there duly excepted, for that the same is error and against law, and said exception was allowed by the court.

(Signed) M. E. HOLLISTER,
Chief Justice Supreme Court, Idaho Territory.

(Endorsed:) Filed March 22d, 1876. A. L. Richardson, clerk.

99 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Territory of Idaho, ss:

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, hereby certify that the foregoing contains a true copy of the record and proceedings in the case of H. O. Harkness, appellant, against Jordan W. Hyde, respondent, lately decided in said court, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Boise City, in said Territory, this 16th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] A. L. RICHARDSON,
Clerk.

100 *Assignment of errors.*

In the Supreme Court of the United States.

H. O. HARKNESS, PL'FF IN ERROR,
vs.
JORDAN W. HYDE, DEF'T IN ERROR.

1st. The supreme court of Idaho erred in denying the motion of pl'ff in error (def't below) to dismiss said action for want of legal service of process. The service having been made on an Indian reservation without the jurisdiction of *of* said district court.

2d. The supreme court of Idaho erred in granting the motion to strike out the statement on motion for new trial used on the hearing of said motion in the district court, said statement having been used on the hearing of said motion, the pl'ff in errror (then def't) had the right,
101 by statute, to use the same on the hearing of the appeal from the judgment.

3d. The supreme court of Idaho erred in affirming the judgment of the district court.

Whereupon the pl'ff in error prays that said judgment of said supreme court of Idaho may be reversed, and that the pl'ff in error herein may be restored to all things which he may have lost by reason of said judgment.

JOHN R. McBRIDE,
Att'y for Pl'ff in Error.

(Indorsement on cover:) No. 219. Henry O. Harkness, plaintiff in error, vs. Jordan W. Hyde. Idaho Terr'y, sup. c't. Filed 11th October, 1876. Nunc pro tunc. See order 26 March, 1878.

IN THE

Supreme Court of the United States.

No. 219.

HENRY O. HARKNESS, PLAINTIFF IN ERROR,

vs.

JORDAN W. HYDE, DEFENDANT IN ERROR.

This is a suit for malicious prosecution. Harkness was the keeper of the Beaver Cañon toll-road in Idaho Territory. Hyde was driving a herd of cattle over this road in July, 1873. He stopped his herd a mile or two from the toll-gate on said road, and sent forward his son to arrange for passing the cattle through the gate. He and the toll-gate keeper could not agree. Hyde then, though passing through the gate with his team and paying the toll, caused his cattle to be driven around the gate and into the road again on the other side of it. L. A. Harkness, who was then in charge of the gate for his brother, the plaintiff in error, wrote a letter to the latter, which will be found on page 30 of the record, detailing the circumstances and urging him to sue Hyde. Accordingly, after consulting counsel and acting upon their advice, Harkness sued Hyde in a justice's court for $83.00 and attached 25 head of his cattle. The case was tried and judgment given for Hyde. The cattle were detained about ten days. This suit was then brought in the district court of Idaho by Hyde against Harkness, on the ground that the suit in the justice's court was a malicious prosecution, and $4,000 damages were claimed. This suit was tried and a verdict and judgment given for $3,500 against Harkness.

A motion was made for a new trial, which the court overruled, upon condition that Hyde would remit $1,000, which he did, and a final judgment was rendered in the case for $2,500. There were about 300 head of cattle in Hyde's herd. Harkness offered to pass them through the gate for $10. Hyde proposed to pay $3.50 or $3.75. The charter rates were 25 cents per head.

It is agreed that Harkness resides upon the Fort Hall Indian reservation and that service of process in this suit was made upon him there by the sheriff of Oneida county. Harkness appeared specially by counsel and moved to dismiss the suit, upon the ground that the sheriff of said county had no authority to serve process upon said reservation. According to the practice in Idaho, this motion was adjourned into the Supreme Court of the Territory and was there overruled. Exception to this decision was taken and duly signed (Record, 8th). When the motion for a new trial was made, a statement of the case, containing the evidence, the rulings of the court upon the trial, and the exceptions thereto of the parties was prepared, agreed to, and signed by the counsel for both parties; and as to said statement the record recites that said motion came on to be heard at chambers before Judge Hollister, the same judge who tried the case, "when the parties appeared by their respective attorneys and argued said motion, and agreed to and used on the arguments on said motion and submitted to the court the statement hereinafter set forth, which was filed in said cause."

On the 10th of August, 1875, the motion for a new trial was overruled with an order "that said defendant shall have until the 1st day of October next to appeal from the judgment so modified, and also from the order overruling the motion for a new trial, and for vacating said judgment, and that execution be in the mean time stayed."

On the 13th of August the modified judgment for $2,500 and costs was entered. Harkness appealed on the 30th of September. Hyde moved to dismiss the appeal in the Supreme Court—

First. Because the appeal was not taken within thirty days from the order overruling the motion for a new trial.

Second. Because the statement used on the motion for a new trial in the district court ought to be stricken from the record, as it was not certified to and signed by the district judge.

The Supreme Court ordered said statement to be stricken from the record, to which ruling Harkness then and there excepted.

The court also dismissed the appeal as to a motion for a new trial, and affirmed the judgment of the district court, to which ruling Harkness then and there excepted.

ASSIGNMENTS OF ERROR.

First. The court below erred in deciding that service of process in this suit was legally made upon plaintiff in error at his residence upon the Fort Hall reservation.

Second. Said court erred in striking said statement from the record.

Third. Said court erred in dismissing the appeal as to said motion for a new trial.

Fourth. Said court erred in affirming the judgment of the district court.

ARGUMENT.

To support the first error assigned it is submitted that the act organizing the Territory of Idaho (12 Statutes, 809, sec. 1,) provides that no territory of the Indians shall be included within the limits or jurisdiction of Idaho without the consent of the Indians; "but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho until said tribe shall signify their assent to the President of the United States to be included within said Territory."

On the 3d of July, 1868, the treaty with the Shoshone Indians was ratified, by which the reservation or country in which the service of process was made in this case was "set apart for the absolute and undisturbed use and occupation of said Indians." 15 Statutes, 674.

This reservation was a part of their territory at that time, the rest of which is ceded by said treaty to the United States. There is no consent, express or implied, in this treaty that said reservation shall be included in the boundaries or subject to the territorial jurisdiction of Idaho.

The territorial authorities have jurisdiction over this territory, or they have not. If they have, then they have executive and legislative, as well as judicial, jurisdiction. If they have not, then the service there of process in this case was, of course, void.

To the objection that a plea to the merits of the case waived the want of legal process, it is answered: That section 454 of the Idaho Code of Practice provides "that upon an appeal from a judgment the court may review the verdict or decision if excepted to, or any intermediate order if excepted to, which involves the merits or necessarily affects the judgment."

This is an intermediate order vitally affecting the case, and was excepted to. If this motion had been overruled by the district court, it certainly could have been reviewed by the supreme court of the territory under the above section, and if reviewable there it is reviewable here. On common law principles the objection was not waived by pleading to the merits. Secrest *vs.* Amott, 5 Blackford, 366; Wheeler *vs.* Lumphorn, 14 Johnson, 481; Shannon *vs.* Comstock, 21 Wendell, 457; Converse *vs.* Warren, 4 Iowa, 158.

As to the other errors assigned, the attention of the court is called to the following opinion of the supreme court of Idaho, delivered by a full bench in January, 1877, in the case of the Idaho World Printing Company *vs.* George Ainslie:

Syllabus.

Upon an appeal from a judgment the court may review the verdict of the jury, if excepted to, and the facts upon which such verdict is based.

An exception to the verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, however, unless the appeal is taken within sixty days after the rendition of the judgment.

A statement used on a motion for a new trial, or settled and authenticated in the manner provided by statute after the decision of such motion when it is made upon the minutes of the court, may be used and considered on appeal from the judgment, as fully, in all respects, as it could be upon an appeal from an order granting or refusing a new trial.

When this court finds, upon a review, that there is a substantial conflict of testimony, it will not disturb the decision of the court below refusing a new trial.

When the testimony consists entirely of depositions, the rule is different, but not when considerable material testimony was oral.

Appeal from the Second Judicial District, Boise County.

This action is upon a balance of account for services rendered by the respondent as editor of the *Idaho World*.

The defendant answered, setting up an express contract, and alleging full payment thereunder.

The issues were tried by a jury, and the plaintiff obtained a verdict for nine hundred dollars, upon which judgment was rendered September 30, 1876. The defendant immediately moved for a new trial, upon the minutes of the Court, which motion was denied. A statement was thereafter settled and authenticated pursuant to the statute, and on the 4th day of October, 1876, an appeal from the judgment was taken to this court. The record brought to this court upon the appeal consists of the judgment-roll, the proceedings, and statement on motion for a new trial, and the notice and undertaking of appeal. The error assigned is that the evidence is insufficient to justify the verdict.

The respondent insists that the facts cannot be reviewed in this court upon an appeal from the judgment, and that the statement, settled after motion for a new trial, can only

be used for the purpose of showing errors of law committed in the court below, excepted to at the trial. This proposition would have been correct under the statute prior to the revised code, but the new code has changed the rule in this respect. Section 454 provides that "upon an appeal from a judgment, the court may review the verdict or decision if excepted to, or any intermediate order if excepted to, which involves the merits or necessarily affects the judgment." The first subdivision of section four hundred and thirty-seven provides that "an appeal may be taken; first, from a final judgment in an action or proceeding commenced in the court in which the judgment is rendered within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

Section 448 provides what shall constitute the record on appeal from a final judgment, viz: "A copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made on the minutes of the court," &c., "may be used on appeal from a final judgment, equally as upon appeal from the order granting or refusing a new trial."

Section 201 of the new practice act provides that the verdict of the jury is to be deemed excepted to.

These several provisions of the statute, examined by their own light, seem to us too clear to admit of any doubt as to their meaning. They are in harmony with each other, and were evidently intended to do away with the necessity of taking two appeals in the same case in order that the facts and the law might be reviewed. Under these statutes the verdict of the jury, if excepted to, may be reviewed on an appeal from a judgment, but if the exception to the verdict is on the ground that it is, supported by the evidence, then, in order to have the same reviewed, such appeal must be taken within sixty days after the rendition of the judgment and upon such review the statement used upon, or settled after motion for new trial in accordance with the statute, may be used, if it could be used on an appeal from an order granting or refusing a motion for a new trial, as fully, and to the same extent, and for all the purposes that it could be

used on such last named appeal. The verdict is "deemed excepted to," which means that the exception is saved, and when properly incorporated in a statement or bill of exceptions, with a statement of the grounds upon which it is based, it is available as an exception. * * * *

The above decision reverses the one by the same court in this case. As I understand this decision and the statutes involved, they amount to this: When an appeal is taken from an order overruling a motion for a new trial, it must be taken within thirty days, if the appeal is to stay the proceedings at that point; but if the motion is overruled and judgment rendered, then, if an appeal is taken from both the decision upon the motion and the judgment within sixty days from the overruling of the motion, both are reviewable in the Supreme Court. Section 444 provides that "when an appeal is perfected as provided in the preceding section of this chapter it stays all further proceedings in the court below upon the judgment or *order* appealed from or upon the matter embraced therein."

If the above be the correct construction of the statutes, then the court below erred in dismissing the appeal from the order overruling the motion for a new trial, because it was not taken within thirty days, as the appeal in this case was from a final judgment as well as from the decision on the motion.

But it is perfectly clear that in any event, if the "statement" could be used at all in the Supreme Court, it could be used upon the appeal from the final judgment as well as upon an appeal from an order overruling a motion for a new trial. Section 448, cited in the foregoing opinion, is too plain for argument upon this point. The court therefore erred in striking this "statement" from the record, even if the appeal from the order as to the new trial was correctly dismissed.

This "statement," it is said, was properly stricken from the record because it was not certified to and signed by the

judge of the district court. To this there are several answers:

1st. Section 448, above cited, provides that on an appeal from a final judgment, the appellant shall furnish the court with a copy of "any bill of exceptions or statement in the case upon which he relies;" and it further provides that any statement "*used*" on a motion for a new trial may be "*used*" on appeal from final judgment equally as upon appeal from the order granting or refusing a new trial. Now, the statement stricken from the record in this case was "used" in the court below upon the motion for a new trial.

2d. The record in this case shows (page 14) that said statement was agreed to by the counsel of the respective parties; that their arguments were based upon it; that it was submitted to the court and filed in the cause. I submit that the court, in receiving, considering, and rendering its judgment upon this statement, necessarily approved and adopted it, and that this record evidence of its approval and adoption is equivalent, in all respects, to a signing by the judge.

Section 22 of the judiciary act requires a citation to be signed "by a judge of the circuit court or a justice of the supreme court," but this court has decided in several cases that such citation is unnecessary if the record of the court below shows that in point of fact the appellee had notice of the appeal. Phillips' Practice, page 93. This "statement" differs from a bill of exceptions in this: Ordinarily, the only evidence that a bill of exceptions has been approved by a judge is his signature thereto, but this record shows, not only that this statement was passed upon by the district court, but that its judgment was rendered upon it, and that gives either party a aight to have that judgment reviewed upon the same statement. If the record shows that a bill of exceptions is approved by the court in which it is made no further signing is necessary.

3. No objection was made in the district court that this statement was not signed by the judge, and, therefore, such

objection cannot be made in the supreme court. If both parties agree to a statement of facts in a lower court, and upon that agreed statement the court makes its decision, both parties are estopped from denying that statement in an appellate court. If an affidavit, document, or deposition, which would not otherwise be competent, is admitted as evidence in a lower court, an objection in violation of such agreement will not be allowed upon appeal. An objection first made in an appellate court will not be allowed if it could have been obviated in the lower court if made there. Munson *vs.* Hayemer, 10 Barbour, 112; Preston *vs.* Sanford, 21 Ind., 156. Cheney *vs.* Beals, 49 Barbour, 523.

4. I believe it to be a fair construction of the Practice Act of Idaho as to these statements to hold that a certificate of the judge is only necessary when there is a controversy between the parties as to what they shall contain, but when both parties agree, as in this case, that the statement is correct, and by the action of the court it is made a part of the record, there is no possible value in a further certificate of correctness by the judge.

It is not necessary and perhaps not proper to say anything as to the merits of the case.

This court will see at a glance that, instead of a malicious prosecution, Harkness had a perfectly good cause of action against Hyde. When the jury in the justice's court beat Harkness they made, as they thought, his road free of toll for themselves. A cayote would have about as much show in court as the keeper of a toll-road, under such circumstances. The district court clearly erred in allowing Hyde to prove as a part of his damages what he had paid his lawyers.

It also erred in excluding the deposition of Riley. It was taken by consent, and used between the same parties in the justice's court.

The district court also erred in not granting the motion for a non-suit.

There was no testimony of malice or the want of probable cause, but on the contrary the evidence showed a good cause of action, and Harkness would have recovered before an impartial jury. If this record shows any malice it is in the verdict of the jury, which the court below ought to have set aside.

The case of *vs.* A. T. Stewart & Co., decided at this term of the court, is conclusive against plaintiff in error upon the merits of the case.

GEO. H. WILLIAMS,
For Plaintiff in Error.

Supreme Court of the United States.

No. 496½

H. O. HARKNESS, PLAINTIFF IN ERROR,

vs.

J. W. HYDE, DEFENDANT IN ERROR.

MOTION TO DISMISS WRIT OF ERROR.

Plaintiff in error resists the motion, and refers to—

Hicker *vs.* Fowler, 1 Black, 95.
New Orleans Railroad *vs.* Morgan, 10 Wall., 256.

GEO. H. WILLIAMS,
For Plaintiff in Error.

In The United States Supreme Court.

H. O. HARKNESS,
Plaintiff in Error,
vs.
JORDON W. HYDE,
Defendant in Error.

No. 496½.
Appeal from Supreme Court of Idaho Territory.

The appellee moves the court to dismiss the appeal in the above-entitled cause, for the reason that the record raises no question which the court can properly review.

The case concisely stated is this: The appellee sued the appellant for maliciously and without probable cause procuring a writ of attachment to be sued out and levied upon twenty-five head of cattle for an alleged indebtedness of $83, and failed in the suit. The attachment was levied in the county where the cause was tried, but the defendant was served with notice on an Indian reservation, which he alleged was outside of the county, and for this reason moved the court to dismiss the suit. The District Court, without passing upon this motion, referred the same to the Supreme Court of the Territory for determination. (Transcript, p. ~~19.~~) 7
That court held the service to be good, and remanded the cause for trial. (Transcript, p. ~~20.~~) Although the party 8
excepted to this decision, he did not stand upon the same and bring the cause to this court, but appeared in the District Court, pleaded to the action, and went to trial. (Transcript, pp. ~~22, 24, 32.~~) The verdict of the jury was for $3,500 in 11
favor of plaintiff. The defendant gave notice of a motion for a new trial, based upon what is styled in the statutes of Idaho a statement of the case, which motion was filed, assigning among other reasons therefor that the damages given by the jury were excessive. (Transcript, p. ~~35.~~) On 13
hearing this motion the court held the damages excessive,

and granted a new trial, unless the plaintiff would enter a remittiter of $1,000. (Transcript, pp. ~~39, 41.~~) This was done by the plaintiff and a judgment rendered for $2,500. No exceptions were taken to the rulings of the court on the motion for a new trial nor to the rendition of the final judgment. (Transcript, p. ~~48.~~)

Afterwards the defendant appealed to the Supreme Court of the Territory. The clerk, in sending up a transcript of its record, incorporated therein the defendant's statement aforesaid, which had not been settled, signed, and certified to by the judge, (Transcript, pp. ~~57–95,~~) as section 211 of the Revised Statutes of 1874-75 of the Territory required. On which account, when the cause came into the Supreme Court, the appellee moved the court to strike the statement from the transcript, as constituting no part of the record. This motion was sustained, and an exception thereto taken and noted. The appellee also moved the court to dismiss the appeal from the ruling of the court on the motion for a new trial, because not taken within thirty days after the order thereon was made, which occurred on the 13th of August, 1873, whereas the notice of the appeal was not given till the 30th of September following. This motion was also sustained, leaving only the final judgment for review, which was affirmed, no question having been reserved for revision.

Now, in this attitude of the record, the appellant in this court assigns two errors found at the end of the transcript:

1st. That the Supreme Court of Idaho erred in deciding that the original service made upon the defendant below, while on an Indian reservation, was effective. We say, in reply, that this question is not reviewable on this appeal, because it had been decided at a previous term of the Territorial Supreme Court, was not appealed from, but, on the other hand, had been waived by pleading to the action, and going to trial on the merits. The present appeal is from another decision of the court made subsequently, when the question of service was not before the court.

2d. The other assignment is, that the court erred in

granting the motion to strike out the statement on motion for a new trial, used on the hearing of said motion in the District Court.

This assignment raises no question which this court can review.

1st. Because it appears affirmatively that the statement referred to was never settled, signed, or certified by the judge, as the 211th section of the Statutes directs; *supra*, nor does it appear that it was used in any way by the court below, in considering the motion for a new trial.

2d. Because the statement in question applies alone to the motion for a new trial, the granting or refusal of which must be appealed from in thirty days. (§ 437 Rev. Statutes.) This was not done for more than forty-five days after the decision thereon, on which account the appeal was dismissed; the striking, therefore, of the same from the record was wholly an immaterial fact, and resulted in no injury to the appellant.

3d. Because the appellant did not in any manner except to the ruling of the District Court on the motion for a new trial, it follows that the Territorial Supreme Court had no question reserved by the record for its review, and if that court had not, how can this court have?

4th. One other reason—a motion to strike out is no part of a record of a cause, unless made so by a bill of exceptions, duly signed and certified by the court. This was not done; how then can this court review the action of the court below on this motion? It follows that the assignments of error are frivolous. The appeal was evidently taken for delay, and should without doubt be dismissed.

R. P. LOWE,
For Appellee.